

No. SC17-1754

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IN THE  
**Supreme Court of Florida**

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GARY RAY BOWLES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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**APPELLANT'S RESPONSE TO  
OCTOBER 2, 2017 ORDER TO SHOW CAUSE**

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RECEIVED, 10/11/2017 04:53:27 PM, Clerk, Supreme Court

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## INTRODUCTION

Appellant’s death sentence was imposed pursuant to a capital sentencing scheme that was ruled unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). A core issue in this case is whether this Court should apply its “retroactivity cutoff” to deny Appellant *Hurst* relief on the ground that his sentence did not become final at least one day after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

This Court has created a state-law retroactivity cutoff at the date *Ring* was decided—June 24, 2002. The cutoff is unconstitutional and should not be applied to Appellant. Denying Appellant *Hurst* relief because his sentence became final on June 17, 2002, rather than some date between June 24, 2002 and 2016, would violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.<sup>1</sup>

### REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal presents an important issue: whether federal law requires this Court to extend *Hurst* retroactivity to death sentences that became final before *Ring*, rather than narrowly applying *Hurst* relief to post-*Ring* death sentences. Appellant respectfully requests oral argument on this and related issues pursuant to Fla. R.

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<sup>1</sup> Relief should not be denied here in light of *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). Appellant notes that there is a petition for a writ of certiorari pending in *Hitchcock* (No. 17-6180).

App. P. 9.320. Appellant also requests that the Court permit full briefing in this case in accord with the normal, untruncated rules of appellate practice.<sup>2</sup>

## ARGUMENT

### I. Appellant's death sentence violates *Hurst*

Appellant was sentenced to death pursuant to an unconstitutional Florida capital sentencing scheme. In *Hurst v. Florida*, the United States Supreme Court held that Florida's scheme violated the Sixth Amendment because it required the judge, not the jury, to make the findings of fact required to impose the death penalty under Florida law. 136 S. Ct. at 620-22. Those findings included: (1) the aggravating factors that were proven beyond a reasonable doubt; (2) whether those aggravators were "sufficient" to justify the death penalty; and (3) whether those aggravators outweighed the mitigation. Under Florida's unconstitutional scheme, an "advisory" jury rendered a generalized recommendation for life or death by a majority vote, without specifying the factual basis for the recommendation, and then the sentencing judge alone, notwithstanding the jury's recommendation, conducted the fact-finding. *Id.* at 622. In striking down that scheme, the Supreme Court held that the jury, not the judge, must make the findings required to impose death. *Id.*

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<sup>2</sup> Depriving Appellant full briefing would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

On remand, this Court applied the holding of *Hurst v. Florida*, and further held that the Eighth Amendment requires *unanimous* jury fact-finding as to each of the required elements, and also a unanimous recommendation by the jury to impose the death penalty. *Hurst v. State*, 202 So. 3d at 53-59. The Court also noted that, even if the jury unanimously finds that each of the required elements is satisfied, the jury is not required to recommend the death penalty, and the judge is not required to sentence the defendant to death. *Id.* at 57-58.

Appellant's jury was never asked to make unanimous findings of fact as to any of the required elements. Instead, after being instructed that its decision was advisory, and that the ultimate responsibility for imposing a death sentence rested with the judge, the jury rendered a generalized recommendation for death. The record does not reveal whether Appellant's jurors unanimously agreed that any particular aggravating factor had been proven beyond a reasonable doubt, or unanimously agreed that the aggravators were sufficient for death, or unanimously agreed that the aggravators outweighed the mitigation.

## **II. This Court's "retroactivity cutoff" at *Ring* is unconstitutional and should not be applied to Appellant**

Beginning with *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court has applied *Hurst* retroactively as a matter of state law and granted relief in dozens of collateral-review cases where the defendant's sentence became final after *Ring*. But the Court has created a state-law cutoff at the date *Ring* was decided—June 24,

2002—to deny relief in dozens of other collateral-review cases. The Court recently reaffirmed its retroactivity cutoff in *Hitchcock v. State*, No. SC17-445, 2017 WL 3431500 (Fla. Aug. 10, 2017). The Court has not addressed in any case whether this retroactivity cutoff at *Ring* is constitutional as a matter of federal law.

The *Ring*-based retroactivity cutoff violates the United States Constitution and should not be applied to deny Appellant the same *Hurst* relief being granted in scores of materially indistinguishable collateral-review cases. Denying Appellant *Hurst* retroactivity because his death sentence became final only one week before *Ring* on June 17, 2002, while affording retroactivity to similarly-situated defendants who were sentenced (or resentenced) between June 24, 2002 and 2016, would violate the Eighth and Fourteenth Amendments’ prohibition against arbitrary and capricious imposition of the death penalty, as well as the Fourteenth Amendment’s guarantee of equal protection and due process.<sup>3</sup>

**A. This Court’s retroactivity cutoff violates the Eighth and Fourteenth Amendments’ prohibition against arbitrary and capricious imposition of the death penalty**

This Court’s retroactivity cutoff violates the Eighth and Fourteenth Amendments’ prohibition against arbitrary and capricious imposition of the death penalty. The death penalty cannot “be imposed under sentencing procedures that

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<sup>3</sup> This Court is obligated to meaningfully address Appellant’s federal retroactivity arguments. *See Testa v. Katt*, 330 U.S. 386, 392-93 (1947) (state courts must entertain federal claims in the absence of a “valid excuse”).

create[] a substantial risk that it would be inflicted in an arbitrary or capricious manner.” *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 310 (1972) (“[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”) (Stewart, J., concurring). In other words, the death penalty cannot be imposed in a way that is comparable to being “struck by lightning.” *Furman*, 408 U.S. at 308.

Experience has already shown the arbitrary results inherent in this Court’s application of the *Ring*-based retroactivity cutoff. The date of a particular death sentence’s finality on direct appeal in relation to the June 24, 2002 decision in *Ring*—and thus whether this Court has held *Hurst* retroactive based on its bright-line cutoff—has at times depended on whether there were delays in transmitting the record on appeal to this Court for the direct appeal; whether direct appeal counsel sought extensions of time to file a brief; whether a case overlapped with this Court’s summer recess; how long the assigned Justice of this Court took to submit the opinion for release; whether an extension was sought for a rehearing motion and whether such a motion was filed; whether there was a scrivener’s error necessitating issuance of a corrected opinion; whether counsel chose to file a petition for a writ of certiorari in the United States Supreme Court or sought an extension to file such a petition; and how long a certiorari petition remained pending in the Supreme Court.

For example, this Court affirmed Petitioner’s and James Card’s unrelated death sentences in separate opinions that were issued on the same day, October 11, 2001. *Bowles v. State*, 804 So. 2d 1173 (Fla. 2001); *Card v. State*, 803 So. 2d 613 (Fla. 2001). Both inmates petitioned for a writ of certiorari in the United States Supreme Court. Mr. Card’s sentence became final four (4) days after *Ring* was decided—on June 28, 2002—when his certiorari petition was denied. *Card v. Florida*, 536 U.S. 963 (2002). Petitioner’s sentence, however, became final seven (7) days before *Ring* was decided—on June 17, 2002—when his certiorari petition was denied. *Bowles v. Florida*, 536 U.S. 930 (2002). This Court recently granted *Hurst* relief to Mr. Card, ruling that *Hurst* was retroactive because his sentence became final after the *Ring* cutoff. *See Card*, 219 So. 3d at 47. Petitioner, on the other hand, whose case was decided on direct appeal on *the same day* as Mr. Card’s, and who filed his certiorari petition in the Supreme Court *after* Mr. Card, now finds himself on the pre-*Ring* side of this Court’s current retroactivity cutoff.

Other arbitrary factors affecting whether a defendant receives *Hurst* relief under this Court’s date-of-*Ring*-based retroactivity approach include whether a resentencing was granted. Under the Court’s current approach, “older” cases dating back to the 1980s with a post-*Ring* resentencing are subject to *Hurst*, while other less “old” cases are not. *See, e.g., Johnson v. State*, 205 So. 3d 1285, 1285 (Fla. 2016) (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was



granted relief on a third successive post-conviction motion in 2010, years after the *Ring* decision); *Card*, 219 So. 3d at 47 (granting *Hurst* relief to a defendant whose crime occurred in 1981 but was afforded relief on a second successive post-conviction motion in 2002—just four days after *Ring* was decided); *cf. Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (granting *Hurst* relief in a case where the crime occurred in the late 1990s, but interlocutory appeals resulted in a 10-year delay before the trial). Under this Court’s approach, a defendant who was originally sentenced to death before Appellant, but who was later resentenced to death after *Ring*, would receive *Hurst* relief and Appellant would not.

Moreover, under the Court’s current approach, litigants whose *Ring* claims were wrongly rejected on the merits during the 2002-2016 period will be denied the benefit of *Hurst* because the Court addressed the issue in a post-conviction rather than direct appeal posture. *See, e.g., Miller v. State*, 926 So. 2d 1243, 1259 (Fla. 2006); *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006); *Bates v. State*, 3 So. 3d 1091, 1106 n.14 (Fla. 2009); *Bradley v. State*, 33 So. 3d 664, 670 n.6 (Fla. 2010).<sup>4</sup>

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<sup>4</sup> Even if this Court were to maintain its unconstitutional retroactivity “cutoff” at *Ring*, individuals who preserved the substance of the *Hurst* decisions before *Hurst*, such as Appellant, should receive retroactivity under the “fundamental fairness” doctrine, which this Court has previously applied in other contexts, *see, e.g., James v. State*, 615 So. 2d 668, 669 (Fla. 1993), and which the Court has applied once in the *Hurst* context, *see Mosley*, 209 So. 3d at 1274, but inexplicably never addressed since. Justice Lewis recently endorsed this “preservation” approach in *Hitchcock*. *See* 2017 WL 3431500, at \*2 (Lewis, J., concurring) (stating that the Court should “simply entertain *Hurst* claims for those defendants who properly presented and

**B. This Court’s retroactivity cutoff violates the Fourteenth Amendment’s guarantee of equal protection and due process**

This Court’s retroactivity cutoff violates the Fourteenth Amendment’s guarantee of equal protection and due process. As an equal protection matter, the cutoff treats death-sentenced prisoners in the same posture—on collateral review—differently without “some ground of difference that rationally explains the different treatment.” *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are created to receive different treatment by a state actor like this Court, the question is whether there is a rational basis for the different treatment. *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The Fourteenth Amendment requires that distinctions in state criminal laws that impinge upon fundamental rights be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Capital defendants have a fundamental right to a reliable determination of their sentences. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). When a state draws a line between defendants who will receive the benefit of the rules designed to enhance the quality of decision-making by a penalty-phase jury, and those who will not, the state’s justification for that line must satisfy strict scrutiny. Far from meeting strict scrutiny, this Court’s *Hurst* retroactivity cutoff lacks even a rational connection to any legitimate state interest. *See Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

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preserved the substance of the issue, even before *Ring* arrived.”). Appellant urges that the Court allow him to brief this aspect of his case in an untruncated fashion.

As a due process matter, denying *Hurst* retroactivity to “pre-*Ring*” defendants like Appellant violates the Fourteenth Amendment because once a state requires certain sentencing procedures, it creates Fourteenth Amendment life and liberty interests in those procedures. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (due process interest in state-created right to direct appeal); *Hicks*, 447 U.S. at 346 (liberty interest in state-created sentencing procedures); *Ford v. Wainwright*, 477 U.S. 399, 427-31 (1986) (O’Connor, J., concurring) (liberty interest in meaningful state competency proceedings); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288-89 (1998) (O’Connor, J., with Souter, Ginsburg, & Breyer, JJ., concurring) (life interest in state-created right to capital clemency proceedings).

Although the right to the particular procedure is established by state law, the violation of the life and liberty interest it creates is governed by *federal* constitutional law. *See Hicks*, 447 U.S. at 347; *Ford*, 477 U.S. at 399, 428-29; *Evitts*, 469 U.S. at 393 (state procedures employed “as ‘an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant’” must comport with due process). Defendants have “a substantial and legitimate expectation that [they] will be deprived of [their] liberty only to the extent determined by the jury in the exercise of its discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.” *Hicks*, 447 U.S. at 346. Courts have found in a variety of contexts that state-created death penalty procedures vest

life and liberty interests that are protected by due process. *See. e.g., Ohio Adult Parole Auth.*, 523 U.S. at 272; *Ford*, 477 U.S. at 427-31.

**III. Because the *Hurst* decisions announced substantive constitutional rules, the Supremacy Clause of the United States Constitution requires state courts to apply those rules retroactively to all cases on collateral review**

**A. The Supremacy Clause requires state courts to apply substantive constitutional rules retroactively to all cases on collateral review**

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), the United States Supreme Court held that the Supremacy Clause of the Constitution requires state courts to apply “substantive” constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In *Montgomery*, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner’s claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. The United States Supreme Court reversed, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34. The Court explained that “*the Constitution* requires state collateral review courts to give retroactive effect to that rule,” *id.* at 728-29 (emphasis added), and that, “[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of

their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge,” *id.* at 731-32.

The *Montgomery* Court found the *Miller* rule substantive even though the rule had “a procedural component.” *Id.* at 734. *Miller* did “not categorically bar a penalty for a class of offenders or type of crime—as, for example, [the Court] did in *Roper* or *Graham*.” *Miller*, 567 U.S. at 483. Instead, “it mandate[d] only that a sentence follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” *Id.* Despite *Miller*’s procedural mandates, the Court in *Montgomery* warned against “conflat[ing] a procedural requirement necessary to implement a substantive guarantee with a rule that ‘regulate[s] only the *manner of determining* the defendant’s culpability.’” *Montgomery*, 136 S. Ct. at 734 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Instead, the Court explained, “[t]here are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish,” *id.* at 735, and that the necessary procedures do not “transform substantive rules into procedural ones,” *id.* *Miller* “bar[red] life without parole . . . . For that reason, *Miller* is no less substantive than are *Roper* and *Graham*.” *Id.* at 734.

**B. The *Hurst* decisions announced substantive rules that must be applied retroactively to Appellant under the Supremacy Clause**

The *Hurst* decisions announced substantive rules that must be applied retroactively to Appellant by this Court under the Supremacy Clause. At least two substantive rules were established by *Hurst v. Florida* and *Hurst v. State*. First, a Sixth Amendment rule was established requiring that a jury find as fact beyond a reasonable doubt: (1) each aggravating circumstance; (2) that those particular aggravating circumstances together are “sufficient” to justify imposition of the death penalty; and (3) that those particular aggravating circumstances together outweigh the mitigation in the case. *Hurst v. State*, 202 So. 3d at 53-59. Such findings are manifestly substantive. See *Montgomery*, 136 S. Ct. at 734 (holding that the decision whether a juvenile is a person “whose crimes reflect the transient immaturity of youth” is a substantive, not procedural, rule). As in *Montgomery*, these requirements amounted to an “instance[] in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish.” *Id.* at 735.

Second, an Eighth Amendment rule was established that requires the elements to be found unanimously by the jury. The substantive nature of the unanimity rule is apparent from this Court’s explanation in *Hurst v. State* that unanimity (1) is necessary to ensure compliance with the constitutional requirement that the death penalty be applied narrowly to the worst offenders, and (2) ensures that the

sentencing determination “expresses the values of the community as they currently relate to the imposition of the death penalty.” 202 So. 3d at 60-61. The function of the unanimity rule is to ensure that Florida’s death-sentencing scheme complies with the Eighth Amendment and to “achieve the important goal of bringing [Florida’s] capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law.” *Id.* As a matter of federal retroactivity law, the rule is therefore substantive. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (“[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule”). This is true even though the rule’s subject concerns the method by which a jury makes its decision. *See Montgomery*, 136 S. Ct. at 735 (state’s ability to determine method of enforcing constitutional rule does not convert rule from substantive to procedural).

The Sixth Amendment requirement that each element of a Florida death sentence must be found beyond a reasonable doubt, and the Eighth Amendment requirement of jury unanimity in fact-finding, are substantive constitutional rules as a matter of federal law because they place certain murders “beyond the State’s power to punish,” *Welch*, 136 S. Ct. at 1265, with a sentence of death. Following the *Hurst* decisions, “[e]ven the use of impeccable factfinding procedures could not legitimate a sentence based on” the judge-sentencing scheme. *Id.* The “unanimous finding of aggravating factors and [of] the facts that are sufficient to impose death, as well as

the unanimous finding that they outweigh the mitigating circumstances, all serve to help *narrow the class of murderers subject to capital punishment,*” *Hurst*, 202 So. 3d at 60 (emphasis added), i.e., the new law by necessity places certain individuals beyond the state’s power to impose a death sentence. Thus, a substantive rule, rather than a procedural rule, resulted from the *Hurst* decisions. *See Welch*, 136 S. Ct. at 1264-65 (a substantive rule “alters . . . the class of persons that the law punishes”).

*Hurst* retroactivity is not undermined by *Summerlin*, 542 U.S. at 364, where the United States Supreme Court held that *Ring* was not retroactive in a federal habeas case. *Summerlin* did not review a statute, like Florida’s, that required the jury not only to conduct the fact-finding regarding the aggravators, but also as to whether the aggravators were *sufficient* to impose death and whether death was an appropriate sentence. *Summerlin* acknowledged that if the Court itself “[made] a certain fact essential to the death penalty . . . [the change] would be substantive.” 542 U.S. at 354. Such a change occurred in *Hurst* where, for the first time, the Court found it unconstitutional for a judge alone to find that “sufficient aggravating factors exist and [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” 136 S. Ct. at 622 (internal citation omitted). Moreover, *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in



addition to the jury trial right, and proof-beyond-a-reasonable-doubt decisions are substantive. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).<sup>5</sup>

#### **IV. The “harmless error” doctrine does not preclude *Hurst* relief**

The “harmless error” doctrine does not preclude *Hurst* relief in this case, notwithstanding the pre-*Hurst* jury’s unanimous recommendation to sentence Appellant to death.<sup>6</sup> This Court’s per se rule that *Hurst* errors are harmless in every

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<sup>5</sup> The recent ruling of an Eleventh Circuit panel in *Lambrix v. Sec’y*, No. 17-14413, 2017 WL 4416205 (11th Cir. Oct. 5, 2017), does not negate Appellant’s arguments. First, *Lambrix* was decided in the context of the current federal habeas statute, which dramatically curtails review: “A state court’s decision rises to the level of an unreasonable application of federal law only where the ruling is objectively unreasonable, not merely wrong; even clear error will not suffice.” *Id.* at \*8 (internal quotation marks omitted). In contrast, this Court’s application of federal constitutional protections is not circumscribed, as this Court noted in the *Hurst* context in *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (“[W]e hold that the Supreme Court’s decision in *Hurst v. Florida* requires that all critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury . . . . We also hold . . . under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury’s recommended sentence must be unanimous”). Second, *Lambrix* dealt with an idiosyncratic issue—the “retroactivity” of Florida’s new capital sentencing statute. *Lambrix* did not argue, as Appellant does here, for the retroactivity of the constitutional rules arising from the *Hurst* decisions. Third, the Eleventh Circuit did not address the specific arguments about federal retroactivity that are raised here. Fourth, almost needless to say, an Eleventh Circuit panel decision has no precedential value in this forum.

<sup>6</sup> *Hurst* errors should be deemed “structural” and not subject to harmless review. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991). The Sixth Amendment error identified in *Hurst*—stripping the capital jury of its constitutional fact-finding role—represents a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Id.* at 310. *Hurst* errors “infect the entire trial process,” *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and

case where the pre-*Hurst* jury unanimously recommended death, *see, e.g., Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), violates the United States Constitution. Appellant’s jury made only a *recommendation* to impose the death penalty, without making any findings of fact as to any of the elements required for a death sentence under Florida law. This Court cannot reliably infer from the jury’s recommendation whether the jury unanimously found—or a hypothetical jury in a constitutional proceeding would have unanimously found—all the other requisite elements for a death sentence. There is a reasonable probability that individual jurors based their overall recommendation for death on a different underlying calculus. *See Hall v. State*, 212 So. 3d 1001, 1037 (Quince, J., dissenting).

This uncertainty as to what the advisory jury would have decided if tasked with making the critical findings of fact takes on additional significance in light of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a death sentence is invalid if imposed by a jury that believed the ultimate responsibility for determining the appropriateness of a death sentence rested elsewhere). Appellant’s jury was led to believe that its role was diminished when the court instructed it that the jury’s role was advisory and that the judge would ultimately determine the sentence. In light of *Caldwell*, this Court cannot even be certain that the jury would have made the

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“deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination” of whether the elements necessary for a death sentence exist, *Neder v. United States*, 527 U.S. 1, 8-9 (1999).

same unanimous *recommendation* without the *Hurst* error, and thus cannot be certain that the jury would have unanimously found the preceding required elements beyond a reasonable doubt. Without the *Hurst* error, where the jury was properly apprised of its fact-finding role, there is a reasonable likelihood that it would have afforded greater weight to Appellant's mitigation. As such, the Court cannot conclude that a jury would have unanimously found or rejected any specific mitigators in a constitutional proceeding.<sup>7</sup> *Cf. Mills v. Maryland*, 486 U.S. 367, 375-84 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (both holding in mitigation context Eighth Amendment is violated when there is uncertainty about jury's vote).

The jury's recommendation in Appellant's case also does not account for the possibility that defense counsel's approach to diminishing the weight of the aggravating factors and presenting mitigation at the penalty phase would have been different had counsel known that the jury, not the judge, would be required to unanimously agree on each of the elements required to impose the death penalty. Counsel's approach to the mitigation surely would have differed had counsel known that the jury would render the findings regarding the weight of aggravation and mitigation. Just as surely, counsel would have given different advice to Appellant

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<sup>7</sup> Proper judicial review measures the impact of the unconstitutional jury scheme and instructions on the jury's consideration of mitigation against the standard articulated in *Boyd v. California*, 494 U.S. 370 (1990). In *Boyd*, the Supreme Court explained that the proper standard is whether there is a "reasonable likelihood" that the jury was impeded from consideration of constitutionally relevant evidence. *Id.* at 380.

about the penalty phase. All of this stands against a harmless error ruling without at least remanding the matter to afford Appellant an evidentiary hearing in the trial court, where the effect of the error on counsel could be addressed.

The jury's unanimous recommendation also does not account for the possibility that the sentencing court may have exercised its discretion to impose a life sentence if the court had been bound by the *jury's* findings on each of the elements required for a death sentence, rather than the *court's own* findings on those elements. *See Hurst v. State*, 202 So. 3d at 57 (noting that nothing in *Hurst* has diminished “the right of the trial court, even upon receiving a unanimous recommendation for death, to impose a sentence of life.”); Fla. Stat. § 921.141(3)(2) (revised Florida capital sentence statute providing that, even if the jury recommends death, “the court, after considering each aggravating factor found by the jury and all the mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.”).

As a matter of federal constitutional law, any reliance on the jury's recommendation in denying *Hurst* relief on harmless error grounds would contravene the Sixth Amendment in light of *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasizing that “harmless-error review looks, we have said, to the basis on which the jury *actually rested* its verdict.”) (internal quotation marks

omitted). In Appellant's and other pre-*Hurst* Florida cases, there was no constitutionally valid jury verdict containing the findings of fact required to impose a death sentence. *Sullivan* requires that, before a reviewing court may apply harmless error analysis, there must be a valid jury verdict, grounded in the proof-beyond-a-reasonable-doubt standard.

Although *Sullivan* addressed a jury verdict as to guilt, the logic of *Sullivan* applies equally in the capital penalty-phase context:

The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

*Id.* at 279-80. In Appellant's case too, any reliance on his advisory jury's recommendation would constitute a violation of the Sixth Amendment.

In addition, the Due Process Clause of the Fourteenth Amendment requires that the State must prove each element beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364. This requirement attaches to any factual finding necessitated by the Sixth Amendment. In *Sullivan*, the Court observed that “the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated.” 508 U.S. at 278. “It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty,

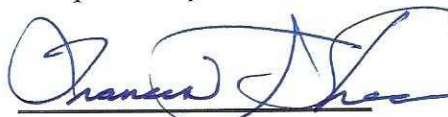
and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt . . . . In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.” *Id.* This requirement is incorporated into the *Hurst* line of cases, beginning with *Apprendi*, 530 U.S. at 476 (“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). Any reliance upon the jury recommendation requires the underpinnings of the recommendation to be made beyond a reasonable doubt. Florida’s pre-*Hurst* jury determinations, including the advisory recommendation in Appellant’s case, did not incorporate the beyond-a-reasonable-doubt standard.

To the extent any aggravators applied to Appellant were based on prior convictions, those aggravators do not render the *Hurst* error harmless. Florida law requires fact-finding as to the “sufficiency” of the aggravators to warrant death. There is no way to conclude whether the jury would have made the same sufficiency determination as the judge. *See, e.g., Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (rejecting “the State’s contention that Franklin’s prior convictions for other violent felonies insulate Franklin’s death sentence from *Ring* and *Hurst*”).

### **CONCLUSION**

This Court should hold that federal law requires the *Hurst* decisions to be applied retroactively to Appellant and remand for a hearing concerning the effect of the error on counsel, or a new penalty phase, and/or imposition of a life sentence.

Respectfully submitted,

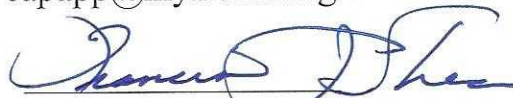


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### **CERTIFICATE OF SERVICE**

I hereby certify that on October 10, 2017, the foregoing was electronically served via the e-portal to Assistant Attorney General Jennifer A. Donahue at [jennifer.donahue@myfloridalegal.com](mailto:jennifer.donahue@myfloridalegal.com) and [capapp@myfloridalegal.com](mailto:capapp@myfloridalegal.com).



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